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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/859,518	05/18/2001	Alessandro Seneci	622-46	4287

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EXAMINER
HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 01/03/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.	Applicant(s)
09/859,516	
Examiner	**Group Art Unit**
	1761

PL

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 9-16-02.

☐ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

☒ Claim(s) 1-6, 8-11 & 14-26 is/are pending in the application.

Of the above claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 1-3, 8-11, 14-19 & 23-26 is/are rejected.

☒ Claim(s) 4-6 & 20-22 is/are objected to.

☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)–(d)

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)–(d).

☐ All ☐ Some* ☐ None of the:

☐ Certified copies of the priority documents have been received.

☐ Certified copies of the priority documents have been received in Application No. _____.

☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____.

Attachment(s)

☐ Information Disclosure Statement(s), PTO–1449, Paper No(s). _____

☒ Notice of Reference(s) Cited, PTO–892

☐ Notice of Draftsperson's Patent Drawing Review, PTO–948

☐ Interview Summary, PTO–413

☐ Notice of Informal Patent Application, PTO–152

☐ Other _____

Office Action Summary

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 2 remains rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Again, claim 2 appears to conflict with both claim 1, from which it depends, and the specification, at the bottom of page 3. Claim 1 refers to the apparent density of the entire *composition*, whereas claim 2 states that the "non gelating soluble alimentary *fibre* has an apparent density of from 430 to 550 g/l." Page 3 of the specification states that "the present composition is a powder having an apparent density of from 430 to 550 g/l." Correction of claim 2 is again required. Note that applicant has presented new claim 17, without this issue.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

i) Claims 1-3 and 8-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Yatka et al. The reference and rejection are taken as cited in a previous Office action.

Applicant's arguments filed 9-16-02 have been fully considered but they are not persuasive. At pages 8-9 of the response, applicants state that the chewing gums of the reference are not in powder form, unlike the amended claim products. This is not deemed persuasive for the reasons of record. As previously addressed on the record, at col. 4, lines 20-35, the reference discloses a known product, Raftilose 95, which is available in powder form, and is "used in most of the examples herein". Regarding the "apparent density" of the instantly-claimed product, applicants state at page 9 that this is the result of a granulation process known in the art, but which is not carried out by Yatka. However, it is noted that the powdered form of Raftilose 95 would be expected to fall within the claimed percentage

ratios, as it would necessarily undergo a drying, powdering and/or granulation-type process, as well. Just as a product claim shall not be negatived by the manner in which it was made, a product shall not be deemed allowable simply by the manner in which it was made, so long as the referenced product meets the claim limitations. This remains an inherent property of the product, as the components are identical to those claimed, and in the same percentage ratios.

Regarding the high-intensity sweeteners in product claims 8-9, this has been addressed of record. At several passages throughout the reference, the initial co-drying of the oligofructose with the additional sweetener, such as aspartame, is disclosed, thus producing a powder composition before incorporation into the chewing gum. In fact, several passages provide for "isolating the oligofructose bulk sweetener from other chewing gum ingredients (col. 6-7).

ii) Claims 1-3 and 8-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Motte.

Motte discloses the production of a sweetener composition comprising a vegetable material with an alimentary fiber content of at least 50% and a particle size of 40-315 microns, combined with an artificial sweetener such as aspartame. The artificial sweetener is mixed with the vegetable material at a ratio of 1-30%, thus inherently producing a combination of at least 0.5-15% sweetener to alimentary fiber (50% of 1-30%). All vegetable (i.e. plant) materials contain levels of "natural" sweeteners, thus meeting the limitation of claim 10.

Regarding the "apparent density" of the instantly-claimed product, applicants are referred to the rebuttal addressed above. Further, it is noted that the particle size of the fiber component is provided at 40-315 microns, thus contributing to the density determination.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 14-19 and 23-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Coussement, in view of the combination of Motte and Yatka et al.

Coussement discloses a dietary fiber-containing sweetener, Raftilose, which contains hydrolyzed inulin oligofructose. "Raftiline is powdered inulin", and Raftilose is hydrolyzed inulin. The "additives are available in various forms depending on the applications, which include milk, milk-based beverages", etc. "Raftilose is more soluble than sucrose... [and] can be used in conjunction with sweeteners such as aspartame." Advantages cited included heat tolerance and texture improvement.

Motte discloses the production of a sweetener composition comprising a vegetable material with an alimentary fiber content of at least 50% and a particle size of 40-315 microns, combined with an artificial sweetener such as aspartame. The artificial sweetener is mixed with the vegetable material at a ratio of 1-30%, thus inherently producing a combination of at least 0.5-15% sweetener to alimentary fiber (50% of 1-30%).

Yatka et al. disclose the production of chewing gum products using oligofructose. The chewing gum contains a combination bulking agent/sweetener composition, which is made by co-drying a solution of oligofructose (i.e. inulin; see col. 3, lines 59-60) with a sweetener, for example, natural sugar sweeteners and high-intensity sweeteners such as aspartame. At levels greater than 10% (with respect to the finished gum product weight), the oligofructose (inulin) stabilizes aspartame (col. 5, lines 45-48; col. 12, lines 8-10; col. 10, lines 47-49, etc.). Oligofructose may be used to encapsulate, agglomerate or entrap high intensity sweeteners such as aspartame (APM), which may improve the sweetener's shelf-life (col. 6, ln 44-53). Oligofructose may also be co-dried with a variety of natural sugars (col. 6, ln 11-14). In the examples (examples 122-125, etc.), as well as in claims 2-3 of the reference, the ratios and amounts of these components are provided. In example 123, aspartame is present in a ratio to inulin (Raftilose 95 powder) of 0.3 to 2.0, based upon the total weight of the gum composition. Maintaining the disclosed protocol of production of the bulking agent/sweetener composition first, the ratio of these components would fall within the instantly-claimed ratios; specifically 13% APM to 87% inulin powder. Example 124 provides percentages of 2.9% APM to 97% inulin (present in the gum composition as 0.3 and 10.0%, respectively). Finally, it is noted that, at col. 4, lines 20-35, the reference discloses a known product, Raftilose 95, which is available in powder form, and is "used in most of the examples herein". Raftilose "contains 95% oligofructose units and 5% sugars (glucose, fructose and sucrose)."

Thus, it would have been obvious to one of ordinary skill in the art to have produced the sweetener combination of an alimentary fiber such as inulin, commercially available as Raftilose, with a synthetic sweetener such as aspartame. It is again noted that Raftilose already contains secondary natural sweeteners (glucose, fructose and sucrose), as mentioned above. Each of the references teach and suggest the combination, and provide for the powdered (granulated) form. The ratios instantly-claimed are

represented by the references (Motte and Yatka et al.). Motte discloses a particle size of the sub-particles used in the combination. The primary reference, Coussement, states that the sweetener may be used in various food and beverage applications, which include milk and milk-based beverages. Regarding instant claims 14-15, the addition of the amount of sweetener to the beverage would have been obvious to one of ordinary skill in the art, and would be a matter of personal choice, based upon the level of sweetness of the composition, and the preferred sweetness of the beverage desired. The use of the sweetener in coffee would have been obvious, as the addition of both natural sugar and artificial sweeteners to coffee, was well known at the time the invention was made. Further, the use in a "chocolate drink", presumably a chocolate milk drink, would have been obvious, as Coussement specifically suggests the use of the sweetener in milk and milk-based beverages. The recitation of the "apparent density" of the instantly-claimed product, is considered an inherent property of the powdered/granulated product, as the components of the sweetener are the same as those disclosed, and in the same percentage ratios.

Conclusion

Claims 4-6 and 20-22 are free of the prior art of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

KEITH HENDRICKS
PRIMARY EXAMINER